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No. 84-849 (4)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

COMMONWEALTH OF KENTUCKY, d/b/a BUREAU OF STATE POLICE - - - Petitioner

versus

JAMES E. GRAHAM, JAMES D. GRAHAM, CHARLES McCLAIN, FAY MANION, SHELBY MANION, ROSE ELLA McCLAIN, ROBERT WILSON, DAVID MORRIS, HERBERT BENNETT, RONALD WILSON, WAYNE CREEKMORE, HAROLD ANTLE, ELLIS ROSS, CLYDE WYATT, GLENN P. DALTON, JAMES B. JONES, MICHAEL ANDERSON, GLEN TILFORD, BRUCE W. SLACK, HOLMES T. STILES, SAMUEL STEWART, JOSEPH W. EDWARDS, DEWEY SKAGGS, CHARLES DAVID LOGSDON, OVERLIN PAYNE, DAVID OWSLEY, TOMMY MASTERSON, CITY OF ELIZABETHTOWN, KENTUCKY, HARDIN COUNTY, KENTUCKY, KENNETH BRANDENBURGH, Individually and as Commissioner of the Bureau of State Police, JAY McREYNOLDS, RICHARD McQUOWN, TERRY HAMMOND, DAVE WILLIAMS, MICHAEL KIPPER, JOHN CARR, EDDIE LAIR, ROBERT ALAN FOSTER, JOHN ROBEY, J. E. COX, RODNEY CIRCLE, and CITY OF HODGENVILLE, KENTUCKY - - - - - - - - - - Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

PETITION FOR CERTIORARI FILED NOVEMBER 28, 1984
CERTIORARI GRANTED JANUARY 14, 1985

(See Inside Cover for List of Attorneys)

WESTERFIELD-SONTE CO., 618 W. KENTUCKY—P.O. BOX 8231, LOUISVILLE, KY.

46 pp

DAVID L. ARMSTRONG
Attorney General

GEORGE M. GEOHEGAN, JR.
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601-3494

CATHY CRAVENS SNELL
General Counsel
Justice Cabinet
State Office Building
Frankfort, Ky. 40601
Counsel for Petitioner

C. MICHAEL WELDON
COLLIER, ARNETT & COLEMAN
P. O. Box 847
Elizabethtown, Kentucky 42701

RICHARD G. SEGAL
1517 Kentucky Home Life Building
Louisville, Kentucky 40202

MR. BERT T. COMBS
WYATT, TARRANT & COMBS
Citizens Plaza
Louisville, Kentucky 40202

HOBSON L. JAMES
The Mall
Elizabethtown, Kentucky 42701

FRANK E. HADDAD, JR.
529 Kentucky Home Life Building
Louisville, Kentucky 40202

WILLIAM E. JOHNSON
JOHNSON & JUDY
326 West Main Street
Frankfort, Kentucky 40601

FRANK G. DICKEY, JR.
WEBB, DICKEY, SULLIVAN & LEMASTER
1701 Vine Center Office Tower
Lexington, Kentucky 40507

(Counsel for Respondents Continued on Following Page)

WOODWARD, HOBSON & FULTON
2510 First National Tower
Louisville, Kentucky 40202

LARRY D. RAIKES
P. O. Box 88
Hodgenville, Kentucky 42748

CHARLES D. GREENWELL
MIDDLETON & REUTLINGER
2500 Brown & Williamson Tower
Louisville, Kentucky 40202

REFORD H. COLEMAN
COLLIER, ARNETT & COLEMAN
P. O. Box 847
Elizabethtown, Kentucky 42701

JACK E. RUCK
WALLACE, GORDINIER, WILSON,
RUCK & COOPER
2250 Citizens Plaza
Louisville, Kentucky 40202

CARL HOWELL, JR.
One Financial Center
Hodgenville, Kentucky 42748

JACK M. LOWERY, JR.
DANIEL B. BOONE
HOLLIS SEARCY
231 South Fifth Street
Louisville, Kentucky 40202

KIM F. QUICK
128 West Dixie Avenue
Elizabethtown, Kentucky 42701
Counsel for Respondents

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UNITED STATES DISTRICT COURT

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
OF LOUISVILLE

No. C-80-0464-L (A)

JAMES E. GRAHAM
Route 7, Box 48, Elizabethtown, Kentucky

JAMES D. GRAHAM
Route 7, Box 48, Elizabethtown, Kentucky

CHARLES MCCLAIN
Rural Route 7, Elizabethtown, Kentucky

FAY MANION
Box 69, Rineyville, Kentucky

SHELBY MANION
Box 69, Rineyville, Kentucky, and

ROSE ELLA MCCLAIN
Box 69, Rineyville, Kentucky - - - *Plaintiffs*

v.

ROBERT WILSON
c/o Kentucky State Police Headquarters
Elizabethtown, Kentucky

DAVID NORRIS
c/o Kentucky State Police Headquarters
Elizabethtown, Kentucky

HERBERT BENNETT
c/o Kentucky State Police Headquarters
Elizabethtown, Kentucky

RONALD WILSON
c/o Kentucky State Police Headquarters
Elizabethtown, Kentucky

WAYNE CREEKMORE
c/o Kentucky State Police Headquarters
Elizabethtown, Kentucky

HAROLD ANTLE
c/o Kentucky State Police Headquarters
Elizabethtown, Kentucky

ELLIS ROSS
c/o Kentucky State Police Headquarters
Elizabethtown, Kentucky

CLYDE WYATT
c/o Kentucky State Police Headquarters
Elizabethtown, Kentucky

GLENN P. DALTON
Route 2, Box 127-A Rineyville, Kentucky

JAMES B. JONES
Route 1, Box 12, Glendale, Kentucky

MICHAEL ANDERSON
c/o Kentucky State Police Headquarters
Elizabethtown, Kentucky

TROOPER TILFORD
Route 1, Falls of Rough, Kentucky

BRUCE W. SLACK
c/o Kentucky State Police Headquarters
Elizabethtown, Kentucky

HOLMES T. STILES
c/o Kentucky State Police Headquarters
Elizabethtown, Kentucky

SAMUEL STEWART
c/o Kentucky State Police Headquarters
Elizabethtown, Kentucky

JOSEPH W. EDWARDS
c/o Kentucky State Police Headquarters
Elizabethtown, Kentucky

DEWEY SKAGGS
c/o Hardin County Sheriff's Office
Elizabethtown, Kentucky

CHARLES DAVID LOGSDON
c/o Hardin County Sheriff's Office
Elizabethtown, Kentucky

OVERLIN PAYNE
c/o Hardin County Sheriff's Office
Elizabethtown, Kentucky

DAVID OWSLEY
c/o Hardin County Sheriff's Office
Elizabethtown, Kentucky

TOMMY MASTERSON
c/o Elizabethtown Police Department
Elizabethtown, Kentucky

CITY OF ELIZABETHTOWN, KENTUCKY
SERVE: James Pritchard, Mayor
111 W. Dixie Ave.,
Elizabethtown, Kentucky

HARDIN COUNTY, KENTUCKY
SERVE: R. R. Thomas, County Judge
Elizabethtown, Kentucky

KENNETH BRANDENBURG, Individually and as Commissioner of the Bureau of State Police
Frankfort, Kentucky

COMMONWEALTH OF KENTUCKY
doing business as the Bureau of State Police
SERVE: Governor, John Y. Brown
Frankfort, Kentucky, and

UNKNOWN DEFENDANTS - - - - *Defendants*

COMPLAINT

Come the Plaintiffs, by counsel, and for their cause of action state as follows:

1. The Plaintiffs are citizens of Hardin County, Kentucky.

2. At all times referred to herein, the Defendants, Kentucky State Police Officers, were employed by the Kentucky Bureau of State Police, were acting under color of state law and are specifically identified in part as follows: Robert Wilson, David Norris, Herbert Bennett, Ronald Wilson, Wayne Creekmore, Harold Antle, Ellis Ross, Clyde Wyatt, Glenn P. Dalton, James B. Jones, Michael Anderson, Trooper Tilford, Bruce W. Slack, Holmes T. Stiles, Samuel Stewart and Joseph W. Edwards.

3. At all times referred to herein, the Defendant, Kenneth Brandenburg, was the Commissioner of the Bureau

of the Kentucky State Police, and, as Commissioner was charged with the legal duty of maintaining law and order within the boundaries of the Commonwealth of Kentucky and with supervising and maintaining the discipline and conduct of all subordinate members of the Bureau of State Police in general and of the named defendant members of the Kentucky Bureau of State Police in particular.

4. The Commonwealth of Kentucky, d/b/a Bureau of State Police is a named Defendant herein and liable to the Plaintiffs in that:

A. The wrongful acts and omissions committed by the Defendant Officers of the Bureau of State Police constituted the execution or implementation of a policy or custom of the Commonwealth of Kentucky.

B. The wrongful acts and omissions committed by the Defendant Officers of the Bureau of State Police were or have been authorized, sanctioned or ratified by state government officials functioning at a policy making level.

C. State government officials functioning at a policy making level were deliberately indifferent to the wrongful acts and omissions against the Plaintiffs by the defendant officers of the Kentucky Bureau of State Police.

D. Pursuant to the provisions of 42 U.S.C. Sec. 1988, the Commonwealth of Kentucky, d/b/a Bureau of State Police is liable for the payment of reasonable attorney fees incurred in this action.

5. At all times referred to herein, the Defendants, Dewey Skaggs, Charles David Logsdon and Overlin Payne, were Deputy Sheriffs of Hardin County, Kentucky, and acting under the color of state law.

6. At all times referred to herein, the Defendant, David Owsley, was duly elected as the Sheriff of Hardin County, Kentucky, and liable for the wrongful acts and

omissions of his Deputy Sheriffs set out herein, pursuant to the provisions of KRS 70.040.

7. The Defendant, Hardin County, Kentucky, is a named Defendant herein and is liable to the Plaintiffs in that:

A. The wrongful acts and omissions committed by the Defendants, Sheriff and Deputy Sheriffs of Hardin County, Kentucky, constituted the execution or implementation of a policy or custom of Hardin County, Kentucky.

B. The wrongful acts and omissions committed by the Defendant, Sheriff and Deputy Sheriffs, were or have been authorized, sanctioned or ratified by Hardin County Officials functioning at a policy making level.

C. Hardin County Officials functioning at a policy making level were deliberately indifferent to the wrongful acts and omissions against the Plaintiffs by the Defendant Sheriff and Deputy Sheriffs of Hardin County, Kentucky.

D. Pursuant to the provisions of 42 U.S.C. Sec. 1988, the Defendant, Hardin County, Kentucky, is liable for the payment of reasonable attorney fees incurred in this action.

8. At all times referred to herein, the Defendant, Tommy Masterson, was employed as a police officer for the City of Elizabethtown, Kentucky, and at all times referred to herein was acting within the scope of his said employment and under color of state law.

9. At all times referred to herein, the acts and omissions committed by the Defendant, Tommy Masterson, were in the course of his employment as a police officer for the City of Elizabethtown, Kentucky, and upon this account, the City of Elizabethtown is liable to the Plaintiffs.

10. The Defendant named herein as unknown defendants are unidentified and unknown officers of the Bureau of State Police of the Commonwealth of Kentucky, peace

officers of unknown counties or cities, and unknown counties or cities, acting under color of state law who permitted or participated in the wrongful acts and omissions set forth herein.

11. The names and addresses of said unknown defendants are unknown to the Plaintiffs but are within the knowledge of the Defendant, Kenneth Brandenburg, Commissioner of the Bureau of State Police and of John A. Smith, duly elected Sheriff of Larue County, Kentucky.

12. The amount in controversy in this action exceeds $10,000.00 exclusive of interest and cost herein.

13. This action arises under 42 U.S.C. Sections 1983, 1985, 1986 and 1988, and the Constitution of the United States of America, including the provisions of the 4th, 5th, 6th, 11th and 14th Amendments thereto.

14. This Court has jurisdiction over this action pursuant to 28 U.S.C. Sec. 1331 and 1343.

15. On or about November 7, 1979, in Hardin County, Kentucky, the Defendants wrongfully, maliciously and in wanton disregard of the rights of the Plaintiffs, James E. Graham, James D. Graham and Charles McClain, invaded the privacy of, falsely arrested and imprisoned, assaulted and beat, terrorized and threatened, and illegally searched the persons and premises of the Plaintiffs.

16. On or about November 7, 1979, in Hardin County, Kentucky, the Defendants wrongfully, maliciously, and in wanton disregard of the rights of the Plaintiffs, Fay Manion, Shelby Manion and Rose Ella McClain, invaded the privacy of, falsely arrested and imprisoned, assaulted and abused, terrorized and threatened, and illegally searched the persons of the Plaintiffs.

17. On or about November 8, 1979, the Defendants abused the legal process of Hardin County, Kentucky, in that they maliciously and with a wrongful motive caused

to be placed against the Plaintiffs, James E. Graham, James D. Graham, and Charles McClain, criminal charges, without probable cause.

18. As a direct and proximate result of the beatings, deprivation of liberty, and the other constitutional violations inflicted upon the Plaintiffs, James E. Graham, James D. Graham and Charles McClain, by the Defendants, these said Plaintiffs were severely and painfully injured and caused to suffer great mental distress and apprehension, were caused to incur medical, hospitalization and legal expenses, all to the damage of each Plaintiff in the amount of $50,000.00.

19. As a direct and proximate result of the deprivation of liberty, the physical abuse, and the other constitutional violations inflicted upon them by the Defendants, these Plaintiffs, Fay Manion, Shelby Manion and Rose Ella McClain, have suffered great fear and mental anguish together with physical and mental pain and suffering, all to the damage of each Plaintiff in the amount of $25,000.00.

20. At all times referred to herein, the Defendants conspired for the purpose of depriving the Plaintiffs of their equal protection of the laws or of their equal privileges and immunities under the law in violation of their rights under the Constitution of the United States, and upon this account, they are liable for all of the malicious acts and omissions referred to herein pursuant to 42 U.S.C. Sec. 1985.

21. At all times referred to herein, the Defendant, Kenneth Brandenburg, Commissioner of the Bureau of State Police, had knowledge of the wrongs conspired to be done as set out previously herein and further had the power to prevent or aid in preventing the commission of same but wrongfully neglected or refused to do so, and on this account, is liable to the Plaintiffs pursuant to the provisions of 42 U.S.C. Sec. 1986.

22. At all times referred to herein, those defendants who were present when the wrongs previously referred to were committed against the Plaintiffs, or those Defendants who had knowledge of the conspiracy to commit said wrongs but neglected or refused to exercise their power and authority as peace officers to prevent or aid in preventing the commission of said wrongs, are liable to the Plaintiffs pursuant to the provisions of 42 U.S.C.S. (sic) Sec. 1986.

23. The wrongful acts and omissions of all of the defendants as set out herein were in malicious and wanton violation of the rights, privileges and immunities secured to the Plaintiffs by the Federal Civil Rights Act and by the Constitution of the United States of America, and upon this account, said defendants are liable to the Plaintiffs and each of them in the amount of $150,000.00 as punitive or exemplary damages.

WHEREFORE, the Plaintiff, James E. Graham, demands judgment herein as follows:

1. For judgment against the Defendants both jointly and severally in the amount of $50,000.00 compensatory damages and $150,000.00 punitive damages.

2. For a trial by jury herein.

3. For his costs herein expended, including the award of reasonable attorney fees.

4. For all other just and proper relief in which he may in anyway appear entitled.

WHEREFORE, the Plaintiff, James D. Graham, demands judgment herein as follows:

1. For judgment against the Defendants both jointly and severally in the amount of $50,000.00 compensatory damages and $150,000.00 punitive damages.

2. For a trial by jury herein.

3. For his costs herein expended, including the award of reasonable attorney fees.

4. For all other just and proper relief in which he may in anyway appear entitled.

WHEREFORE, the Plaintiff, Charles McClain, demands judgment herein as follows:

1. For judgment against the Defendants both jointly and severally in the amount of $50,000.00 compensatory damages and $150,000.00 punitive damages.

2. For a trial by jury herein.

3. For his costs herein expended, including the award of reasonable attorney fees.

4. For all other just and proper relief in which he may in anyway appear entitled.

WHEREFORE, the Plaintiff, Fay Manion, demands judgment herein as follows:

1. For judgment against the Defendants both jointly and severally in the amount of $25,000.00 compensatory damages and $150,000.00 punitive damages.

2. For a trial by jury herein.

3. For her costs herein expended, including the award of reasonable attorney fees.

4. For all other just and proper relief in which she may in anyway appear entitled.

WHEREFORE, the Plaintiff, Shelby Manion, demands judgment herein as follows:

1. For judgment against the Defendants both jointly and severally in the amount of $25,000.00 compensatory damages and $150,000.00 punitive damages.

2. For a trial by jury herein.

3. For her costs herein expended, including the award of reasonable attorney fees.

4. For all other just and proper relief in which she may in anyway appear entitled.

WHEREFORE, the Plaintiff, Rose Ella McClain, demands judgment herein as follows:

1. For judgment against the Defendants both jointly and severally in the amount of $25,000.00 compensatory damages and $150,000.00 punitive damages.

2. For a trial by jury herein.

3. For her costs herein expended, including the award of reasonable attorney fees.

4. For all other just and proper relief in which she may in anyway appear entitled.

Boone & Lowery

(s) By: Jack Lowery, Jr.
231 South Fifth Street
Louisville, Kentucky 40202
502-589-6060

DOCUMENT No. 168, ENFORCEABLE SETTLEMENT AGREEMENT TO BE HELD IN CAMERA, IS BEING SENT IN A SEALED ENVELOPE TO THE UNITED STATES SUPREME COURT CLERK.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

C-80-0464-L(A)

JAMES E. GRAHAM, ET AL. - - - - *Plaintiffs*

v.

ROBERT WILSON, ET AL. - - - - *Defendants*

MOTION

Come the Plaintiffs, by counsel, and move the Court to enter the following Order. In support hereof there is attached hereto the Plaintiffs' Memorandum of Authorities.

(s) Jack M. Lowery
Counsel for Plaintiffs
231 South Fifth Street
Louisville, Kentucky 40202
589-6060

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

C-80-0464-L(A)

JAMES E. GRAHAM, ET AL. - - - - *Plaintiffs*

v.

ROBERT WILSON, ET AL. - - - - *Defendants*

ORDER

On Motion of the Plaintiffs, by counsel, and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED that counsel for the Plaintiffs shall be awarded attorney's fees for their services in the above-styled action assessable against the Commonwealth of Kentucky and this cause is assigned to the _____ day of _____, 1982, at ____M. for hearing as to the amount of said attorney's fees.

_____
Judge

_____
Date

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

C-80-0464-L (A)

JAMES E. GRAHAM, ET AL. - - - - *Plaintiffs*

v.

ROBERT WILSON, ET AL. - - - - *Defendants*

PLAINTIFF'S MEMORANDUM OF AUTHORITIES IN SUPPORT OF THE MOTION FOR AN AWARD OF ATTORNEY'S FEE PURSUANT TO THE PROVISIONS OF 42 U.S.C. SEC. 1988

May it please the Court:

The Civil Rights Attorney's Fee Award Act of 1976 provides, in pertinent part, as follows:

> "In *any* action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985 and 1986 of this title . . . or title IV of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." (emphasis supplied)

It requires no argument to show that the above language is broad and contains no expression of limitation or restriction.

This obviously is not original with the writer. The Supreme Court of the United States in *Hutto* v. *Finney,* 437 U. S. 678 (1978) made the following observation:

> "As this Court made clear in Fitzpatrick v. Bitzer, 427 U. S. 445, Congress has plenary power to set aside the

> States' immunity from retroactive relief in order to enforce the Fourteenth Amendment. When it passed the Act, Congress undoubtedly intended to exercise that power and to authorize fee awards payable by the States when their officials are sued in their official capacities. The Act itself could not be broader. It applies to "any" action brought to enforce certain civil rights laws."

It is clear that the Congress of the United States in enacting the Civil Rights Attorney's Fee Award Act of 1976 sought to encourage plaintiffs to vindicate and enforce their constitutional rights. So much is this the case that it is fair to conclude that a presumption exists that successful plaintiffs will be awarded attorney's fees, the only possible exception arising from such special circumstances as would render such an award unjust. *Equal Employment Opportunity Commission* v. *Bailey Co.,* 563 F. 2d 439 (6th Cir. 1977).

What are the special circumstances in the case at bar? These plaintiffs successfully initiated an action to enforce their federally protected rights under the provisions of 42 U.S.C., §1983. A substantial portion of their recovery was obtained as a result of the actions of Kenneth Brandenburgh, committed by him in his official capacity as the highest ranking member of the Kentucky State Police.[1] These plaintiffs also obtained an out of court settlement on their 1983 claim from the City of Elizabethtown and from Hardin County, Kentucky. It is thus clear beyond any possibility of dispute that these plaintiffs were prevailing parties. Their status as prevailing parties is not in any way affected by the fact that they prevailed through settle-

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[1]Actually the judgment was obtained against two Deputy Sheriffs of Hardin County, Kentucky.

ment rather than by jury verdict. *Maher* v. *Gagne,* 448 U. S. 122 (1980).

Since the plaintiffs have fully complied with the requirements of §1988, the only remaining issue is: whether or not this Court is authorized to assess these attorney's fees against the Commonwealth of Kentucky, an entity which this Court earlier held was not a proper party defendant. Both the legislative history of the enactment of the Attorney's Fee Act and the consistent holdings of the federal judiciary provide the affirmative answer to this question.

In *Miller* v. *Carson,* 563 F. 2d 741 at p. 755 (1977), the Fifth Circuit Court of Appeals quoted the following language from the Report of the Senate Committee on the Judiciary on the Civil Rights Attorney's Fee Award Act as follows:

> "In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency, or under his control, or from the State or local government (*whether or not the agency or government is a named party*)."

The Court thus concluded,

> "Congress meant to allow the awards against governmental units even when the units are not named parties."

There are many similar holdings *Morrow* v. *Dillard,* 580 F. 2d 1284 at p. 1299 (1979); *Familias Unidas* v. *Briscoe,* 619 F. 2d 391 (1980).

It is equally clear that the enactment by the Congress of §1988 was a constitutional exercise of its powers under the Fourteenth Amendment, which effectively removed any Eleventh Amendment immunity in favor of the individual states insofar as the award of attorney's fees is concerned.

See *Maher* v. *Gagne, supra; Seals* v. *Quarterly County Court,* 562 F. 2d 390 (6th Cir. 1977).

The foregoing authority brings us to the only remaining issue in this case. This issue may be simply stated: are attorney's fees "retroactive damages" and may they properly be awarded only in cases in which prospective relief is obtained?

As to the retroactive damage issue, it is completely well settled that attorney's fees are not "damages."

We submit to the Court that the holding of *Hutto* v. *Finney, supra,* clearly establishes that the award of attorney's fees is simply an assessment of "costs," which have historically been awarded against state governments without regard to any Eleventh Amendment immunity. As early as the case of *Fairmont Creamery Co.* v. *Minnesota,* 275 U. S. 70 (1927), the Supreme Court recognized that insofar as the assessment of costs is concerned, a federal court may treat a state just as any other litigant. Congress was careful in enacting §1988 to provide that attorney's fees could be imposed not as damages but as "part of the costs." We believe the judicial and congressional treatment of attorney's fees as being distinctly different from the award of damages is so obvious as to require no further argument.

It finally becomes necessary to consider whether or not Congress intended the provisions of 1988 to apply to a broad range of cases in which constitutional rights were successfully vindicated or whether the Congressional intent was to restrict the award of attorney's fees to those cases in which prospective relief was obtained.

We would first point out to the Court that the language of the Act itself provides that attorney's fees will be awarded in *any* action to enforce the provisions of §1983. Moreover, a diligent search has failed to reveal *any* holding that an award of attorney's fees against a state is restricted

to cases involving prospective relief. The only cases that have been suggested as raising this implication are *Edelman* v. *Jordan,* 94 S. Ct. 1347; *Hutto* v. *Finney, supra,* and *Quern* v. *Jordan,* 440 U. S. 332.

Edelman, supra and *Quern, supra,* merely held that a plaintiff could not recover retroactive money damages against a state. The question of attorney's fees was not involved in these cases top side or bottom.

In footnote 24 at p. 695 the Supreme Court in *Hutto, supra,* made the following statement:

> "While the decisions allowing the award of costs against States antedate the line drawn between retroactive and prospective relief in Edelman v. Jordan, 415 U. S. 651, such awards do not seriously strain that distinction. Unlike ordinary "retroactive" relief such as damages or restitution, an award of costs does not compensate the plaintiff for the injury that first brought him into court. Instead, the award reimburses him for a portion of the expenses he incurred in seeking prospective relief. (An award of costs will almost invariably be incidental to an award of prospective relief, for costs are generally awarded only to prevailing parties, see Fed. Rule Civ. Proc. 54(d), and only prospective relief can be successfully pursued by an individual in a suit against a State.)

Let us briefly analyze this footnote. The Supreme Court obviously recognizes that the award of costs (attorney's fees) does not constitute an award of retroactive damages. Second, when the Court observes that the award of fees merely reimburses the plaintiff for a portion of the expenses incurred in seeking prospective relief, the Court is simply recognizing that in the quoted authority, *Edelman, supra,* the plaintiff there was in fact seeking prospective relief.

The final statement "only prospective relief can be successfully pursued by an individual in a suit against the state" is, of course, undeniably true. The only factual circumstance in which an individual would ever be constitutionally privileged to actually name a state as a party defendant would be a case in which injunctive relief was the appropriate remedy. Clearly, an individual cannot sue a state for retroactive damages.

Conceding the full implication of the above dicta in *Hutto, supra,* it by no means follows that the plaintiffs are precluded from suing a policy making state official for either damages or prospective relief. In the case of the high ranking official (as compared to the state itself), 1988 makes no distinction as to the appropriateness of an attorney's fee award whether the relief sought is retroactive or prospective. The golden thread is the successful vindication by the plaintiff of his constitutionally or federally protected rights.

Perhaps, we can illustrate the total implausibility of any other construction.

Let us suppose in Example A that the Commissioner of Corrections implements a policy whereby prison housing is grossly overcrowded. Suppose further that the Commissioner restricted the diets of the prisoners to sub-human levels and that brutality was rampant throughout the entire system. Would the state who employed this Commissioner of Corrections be a proper party defendant? The answer is clearly no. Would prospective relief be granted against the Commissioner, the effect of which would be the same as if the state had been made a party defendant? The answer is clearly in the affirmative. This is the teaching of *Hutto, supra.* In *Hutto, supra,* upon similar facts, an attorney's fee award assessed against the state was specifically approved.

Example B. The same Commissioner of Corrections personally goes to a cell, housing two of the same plaintiffs and callously stands by while subordinate prison officers brutally beat these plaintiffs. The two inmates then file suit under 42 U.S.C. §1983 charging the Commissioner with deliberate indifference to their rights. Would the state be a proper defendant in this example? The answer, of course, is no. Could, however, the plaintiffs institute their civil rights action against the Commissioner in his official capacity for the violation of their federally protected rights and seek damages? The answer is in the affirmative. We further ask: is there any logical reason why these same plaintiffs who could recover attorney's fees against the state upon the successful enforcement of their civil rights in Example A should not also receive such an award in Example B? We submit that the clear and necessary intent of Congress as reflected both in the language of the Act itself as well as the Report of the Senate Committee on the Judiciary (See *Miller* v. *Carson, supra*), precludes such an irrational and unjust distinction.

First of all, it must be recognized that only in rare instances have we witnessed a factual situation in which a high ranking state official becomes so personally involved in the direct constitutional violation of another that he becomes answerable in damages. In the vast majority of cases, the involvement of the high ranking state official is usually restricted to implementing an unconstitutional policy of a continuing nature and in such an instance, prospective relief is the means adopted by the Plaintiff to vindicate his constitutional rights. It by no means follows, however, that there is a total absence of decisions wherein successful plaintiffs were granted attorney's fees against a state where damages and damages alone were recovered.

In *Rheuark* v. *Shaw,* 447 F. Supp. 897 (1979), the plaintiffs obtained damages against a state judge and his court

reporter, because of a 23 month delay in the preparation of the transcript of the trial in which they were earlier convicted of various criminal offenses. This delay, alleged the plaintiffs, violated their constitutional rights to a speedy appeal and to due process of law. *These plaintiffs were awarded specific money damages, but were denied all injunctive relief.* In approving the award of attorney's fees against Dallas County (in this context, the county stands on the same legal basis as a state) the Court held,

> "By enacting 42 U.S.C. §1988 "Congress intended to override the Eleventh Amendment immunity of the states and authorized fee awards payable by the states when their officials were sued in their official capacity."

It is thus obvious that the holding in *Rheuark, supra,* establishes that the obtaining of prospective relief is not a condition precedent to an award of attorney's fees under 1988.

In *Raney* v. *Jackson State College,* 551 F. 2d 672 (1977), the Fifth Circuit Court of Appeals was faced with three separate appeals arising out of the violation of Raney's First Amendment right to free speech by members of the Mississippi State Board of Trustees of Institutions of Higher Learning. Raney, under contract to teach at Jackson State College for the academic year, 1970-71, testified as an expert defense witness on behalf of persons charged with criminal obscenity in the exhibition of a motion picture. When Raney's activities became known, the Trustees elected to terminate his employment. A 1983 action was filed in the District Court and dismissed for lack of subject matter jurisdiction. On appeal, the Fifth Circuit granted an injunction to prevent Raney's dismissal until such time as his damage case could be heard. The college did not totally comply with this order, and it became necessary for Raney to reapply to the Fifth Circuit obtaining the further

order that pending trial, Raney be reinstated to the type of teaching contemplated in his contract and not merely research.

The case eventually came to trial, and the jury returned verdicts against Raney and in favor of the Board of Trustees. On appeal, the Fifth Circuit held that Raney was entitled to a judgment notwithstanding the jury verdict on the limited grounds that Raney had been wrongfully denied his First Amendment right of free speech for the academic year 1970-71.

All other issues were decided in favor of the defendants. *No prospective relief whatsoever was obtained. The injunctions entered were not for the purpose of securing prospective relief, but were for the purpose of maintaining the status quo until the matter could be brought on for trial.* The defendant's cross-appeal alleging that the Eleventh Amendment barred any award of attorney's fees against the state was denied. In spite of the fact that the only vindication obtained by Raney was the "declaratory judgment that he was not terminated at Jackson State for any reason other than his previous exercise of his First Amendment right to free speech", an unanimous Court approved the award of attorney's fees under §1988.

Once again, Raney makes it very clear that the award of prospective relief is not a condition precedent to an award of attorney's fees against a state.

In all fairness and candor, however, can there ever be an award of damages against a high ranking state official for constitutional violations committed by him without an accompanying and inherent prospective benefit to the plaintiffs individually and to the public generally? We have always assumed that as a basic corner stone of tort law, and here we are dealing with constitutional torts, was the recognition that the vindication of individual rights in a given case, through damages, would offer prospective re-

lief to unnamed members of the public, who might be spared these same abuses because of the example rendered in the earlier case.

It is our deep conviction that the recovery of damages in a case such as this one will offer as much, if not more, prospective relief than would be afforded by any injunction which the Court could enter. By the same token, we are convinced that a holding which stifles the broad purpose of Congress to encourage the vindication of constitutional rights by awarding attorney's fees against a state would have an adverse prospective effect.

For all of the foregoing reasons, we submit that the Court should authorize an award of attorney's fees pursuant to the provision of 42 U.S.C. §1988 against the Commonwealth of Kentucky and that this matter should be assigned for a hearing so that the Court may approve the amount of the fees to be awarded.

Jack M. Lowery
Counsel for Plaintiffs
231 South Fifth Street
Louisville, Kentucky 40202
589-6060

CERTIFICATE

I hereby certify that a copy of the Plaintiff's Memorandum of Authorities in Support of the Motion for an Award of Attorney's Fee was mailed to Mr. Steven L. Beshear, Attorney General, State Capitol, Frankfort, Kentucky 40601 this 13th day of July, 1982.

(s) Jack M. Lowery
Jack M. Lowery
Counsel for Plaintiffs
231 South Fifth Street
Louisville, Kentucky 40202
589-6060

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C80-0464-L(A)

JAMES E. GRAHAM, ET AL. - - - - *Plaintiffs*

v.

ROBERT WILSON, ET AL. - - - - *Defendants*

RESPONSE TO PLAINTIFFS' MOTION FOR ATTORNEYS FEES

Comes now the Commonwealth of Kentucky and responds to plaintiffs' request for attorneys fees against the Commonwealth of Kentucky as follows:

1. On November 26, 1980, this Court specifically dismissed the Commonwealth of Kentucky as a defendant in this action and ruled that attorneys fees are only proper where prospective relief is sought or granted.

2. Since then the Commonwealth of Kentucky has not been, and is not now, a party to this action and the Court has no jurisdiction to assess attorneys fees against the Commonwealth.

3. Although the Agreed Order dismissing the above styled action as settled does not prevent any party from making a claim against the Commonwealth of Kentucky for legal fees and court costs, the Commonwealth of Kentucky was not a party to this settlement and did not agree in any way to pay any attorneys fees in this action.

4. The Agreed Order dismissing and settling this case did not seek nor encompass any injunctive or perspective relief on behalf of the plaintiffs against the Commonwealth

of Kentucky, and therefore, any fees or claims against the Commonwealth of Kentucky are barred by the Eleventh Amendment to the United States Constitution. [See *Quern* v. *Jordan*, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979)].

Respectfully submitted,

(s) Paul F. Isaacs
Paul F. Isaacs
General Counsel
Department of Justice
State Office Building
Frankfort, Kentucky 40601
Telephone (502) 564-7554
Counsel for Commonwealth of Kentucky

NOTICE

Please take notice that the foregoing Response to Plaintiffs' Motion for Attorneys Fees will be mailed, postage prepaid, to the Clerk of the Court on this 10th day of August, 1982, to be considered at the convenience of the Court.

(s) Paul F. Isaacs
Paul F. Isaacs
Counsel for Commonwealth of Kentucky

(CERTIFICATE OF SERVICE
OMITTED IN PRINTING).

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C80-0464-L(A)

JAMES E. GRAHAM, ET AL. - - - - *Plaintiffs*

v.

ROBERT WILSON, ET AL. - - - - *Defendants*

MOTION TO VACATE THE ORDER GRANTING ATTORNEY'S FEES OR IN THE ALTERNATIVE MOTION TO HOLD THE HEARING GRANTING ATTORNEY'S FEES IN ABEYANCE

Comes the Commonwealth of Kentucky, by and through counsel, and moves this Court to vacate its order of September 9, 1982, which awarded attorney's fees to the plaintiffs for their action against the Commonwealth on the following grounds:

(1) The September 9, 1982, Order directly conflicts with the November 26, 1980, Order which dismissed the Commonwealth from the law suit on the grounds that the Eleventh Amendment to the United States Constitution barred the law suit and the relief sought by the plaintiffs because it was retrospective rather than prospective. Also in that Order this Court specifically found that "attorney's fees may be awarded against the state in an action by a private litigant only when the release sought is prospective in nature." See *Hutto* v. *Finney,* 437 U.S. 678 (1978); *Edelman* v. *Gordon,* 415 U.S. 651 (1974). See the attached Order, Commonwealth Exhibit No. 1.

(2) The Commonwealth, which has been dismissed from this suit, is prejudiced by being brought at this late

date after it has been dismissed and has not participated in this case either directly as a party or indirectly by supporting any other party through payment of any fees or damages, the ratification of any officers' actions, or any other type of direct or indirect support or participation. The Court in *Hutto, supra,* explicitly found that the Arkansas Corrections officials were operating in bad faith; that the State of Arkansas provided for the officers' attorney through the use of the Attorney General and that the District Court gave repeated warnings to remedy the violations. The facts before this Court differ completely. The Commonwealth of Kentucky has acted in good faith throughout this matter. It has not condoned the actions of the State Police, but replaced the Commissioner. The Commonwealth has steadfastly refused to pay for any of the defendant's attorneys' fees, costs or damages. In addition to failing to meet the prospective relief criteria of *Hutto,* the plaintiffs have not shown any bad faith or any participation on the part of the Commonwealth.

(3) Because the Commonwealth of Kentucky has not been, and is not now a party, the Court has no authority to assess fees against the Commonwealth in its own name. Because Kenneth Brandenburgh, former Commissioner of the State Police, was dismissed from this suit in the Agreed Order Dismissing and Agreed Order Dismissing Settled signed by all parties and approved by the Court on July 1, 1982, he is not before this Court either. Paragraph two of this settlement dismissed *"any claim against the Defendant, Kenneth Brandenburgh."* The agreement extinguishes all claims against Mr. Brandenburgh in his official capacity as well as his individual capacity. Therefore, even if the Commonwealth could be held responsible for these fees under *Hutto,* the plaintiffs have agreed to extinguish all claims against Mr. Brandenburgh. Because all claims have been dismissed against Mr. Brandenburgh and he is

no longer a party, the plaintiffs have no cause of action against him in any form nor can the plaintiffs reach the Commonwealth through Brandenburgh because he is not before the Court.

(4) The plaintiffs are not a prevailing party within the meaning of 42 U.S.C. § 1988. This case was settled by all parties who were not dismissed outright by the Court. The language of the Agreed Settlement, which is below, clearly states that fault was not found to exist.

By agreement of the parties, it is ordered:

1. No fault having been found, this action is dismissed with prejudice against Defendants, Antle, Dalton, Tilford, Stiles, Creekmore, Ross, Anderson, Edwards, Slack, Robert Wilson, Norris, Ronald Wilson, Jones, Stewart, Williams, Kipper, Hammond, Wyatt, Robey, McReynolds, Foster, McQuown and Bennett.
2. No fault having been found as to any claim against the Defendant, Kenneth Brandenburgh, this action is dismissed settled, with prejudice, at the defendant's cost.

Even though the plaintiffs may recover attorney's fees for a settlement under certain circumstances, they should not recover in the instant case. Because no admissions of proof or fault exist, the plaintiffs have not demonstrated that they prevailed on any issues. Rather the parties entered into an in camera settlement to which the Commonwealth is not privy and has not seen. The plaintiffs and other defendants can not bind the Commonwealth to a settlement to which it is not a party.

Based on all the above grounds, the Commonwealth asks this Court to vacate its Order granting attorney's fees.

In the alternative that this Court chooses not to vacate its Order, the Commonwealth moves that this hearing for

attorney's fees be held in abeyance on the grounds that no documentation of any type concerning the attorney's fees has been provided to the Commonwealth. This information is necessary so that the Commonwealth may adequately defend the case through competent cross-examination and enable it to present proof to rebut the plaintiffs' presentation. Therefore, the Commonwealth requests that this case be held in abeyance until such time that this Court determines whether to grant the Commonwealth's Motion to Vacate its Order of September 9, 1982, and if the Court makes a determination that such a hearing should be held that the plaintiffs be ordered to provide all documentations concerning attorney's fees to the Commonwealth prior to the hearing and that a hearing be set in a reasonable length of time after the plaintiffs have supplied all of the requested information.

Wherefore, the Commonwealth prays for an appropriate Order granting its Motion to Vacate or in the alternative its Motion to Hold this Hearing in Abeyance.

Respectfully submitted,

(s) Cathy Cravens Snell
Cathy Cravens Snell
Justice Cabinet
Office of General Counsel
State Office Building
Frankfort, Kentucky 40601
Telephone (502) 564-7554
Counsel for Commonwealth of Kentucky

(CERTIFICATE OF SERVICE OMITTED IN PRINTING).

EXHIBIT

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

Civil Action No. C-80-0464 L(A)

JAMES E. GRAHAM, ET AL. - - - - *Plaintiffs*

v.

ROBERT WILSON, ET AL. - - - - *Defendants*

ORDER

Defendant, Commonwealth of Kentucky, having moved to dismiss this action on the grounds that the Eleventh Amendment to the Constitution of the United States bars it, and it appearing to the Court that the relief sought by the plaintiffs is retrospective in nature and not prospective, and that the United States Supreme Court has held in *Quern* v. *Jordan,* 440 U. S. 332 (1979), *Hutto* v. *Finney,* 437 U. S. 678 (1978) and *Edelman* v. *Jordan,* 415 U. S. 651 (1974) that attorney's fees may be awarded against a state in an action by a private litigant only when the relief sought is prospective in nature.

IT IS ORDERED that the motion to dismiss be and it is hereby sustained.

This is not a final and appealable order.

Dated 11-26-80

(s) Charles M. Allen
Charles M. Allen
Chief Judge

cc: Counsel of Record

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

C 80-0464 L(A)

JAMES E. GRAHAM, Et Al.

v.

ROBERT WILSON, Et Al.

ORDER

The above-styled action came on for hearing on October 15, 1982, on the question of the amount of attorneys fees to be awarded to counsel for plaintiff. It appearing that the Commonwealth has now filed a Motion to Vacate and counsel for the plaintiffs having filed this day Affidavits and supporting documents relative to amounts, time spent, etc.,

IT IS ORDERED that this matter be continued to November 2, 1982, for said hearing on fees.

IT IS FURTHER ORDERED that counsel for the State shall have 10 days hereafter in which to file an additional memorandum in support of its motion to vacate to which the plaintiffs indicated they would probably not file any further response.

IT IS FURTHER ORDERED that the Commonwealth shall have 10 days hereafter in which to file specific objections regarding the affidavits and attachments filed this day by counsel for plaintiff.

October 18, 1982

(s) Charles M. Allen
Charles M. Allen, Chief Judge
United States District Court

Copies to:
Counsel

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 80-0464-L(A)

JAMES E. GRAHAM, Et Al. - - - - *Plaintiffs*

v.

ROBERT WILSON, Et Al. - - - - *Defendants*

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO VACATE THE ORDER GRANTING ATTORNEY'S FEES

STATEMENT OF FACTS

This entire case arises out of alleged actions of assault and battery committed by individual members of the defendant class against the plaintiffs, and the alleged acquiescence by individuals in the State Police. No allegations were proven and the plaintiffs settled this case on the basis of no fault having been found." (See Agreed Order Dismissing and Agreed Order Dismissing Settled of July 1, 1982). The plaintiffs sought an award for monetary damages only. They did not seek injunctive relief at any stage of this suit.

Three primary orders should be reviewed when considering the denial of attorney's fees; the November 26, 1980 Order which dimissed the Commonwealth as a party, the July 1, 1982 Agreed Order Dismissing and Agreed Order Dismissing Settled, and the September 9, 1982 Order which granted attorney's fees.

On November 26, 1980, this Court entered an Order dismissing the Commonwealth of Kentucky based on the Eleventh Amendment. The Court further found:

> . . . The relief sought by the Plaintiffs is restrospective in nature and not prospective, and that the United States Supreme Court has held in *Quern* v. *Jordan,* 440 U. S. 332 (1979); *Hutton* v. *Finney,* 437 U. S. 678 (1978) and *Edelman* v. *Jordan,* 415 U.S. 651 (1974) that attorney's fees may be awarded against the state in an action by a private litigant only when the relief sought is prospective in nature. . . .

On July 1, 1982, this Court entered an Agreed Order Dismissing and Agreed Order Dismissing Settled in this suit. The Commonwealth did not participate in the settlement in any manner. Furthermore, the Commonwealth did not agreed to pay nor has it paid any damages, attorney's fees, or costs. The Kentucky State Police Legal Fund is a private voluntary organization which appears to have participated in the settlement in some manner. Counsel for the Commonwealth still has not been served or even seen a copy of the signed settlement which this Court is holding in camera. This settlement cannot bind the Commonwealth because is was not a party. Plaintiffs' counsel, Daniel Boone and Hollis Searcy, signed and agreed to the settlement. Paragraph two of the aforementioned Agreed Order states: "No fault having been found as to any claim against the defendant, Kenneth Brandenburgh, this action is dismissed settled, with prejudice, at the defendant's cost."

On September 9, 1982, this Court entered an Order without holding a hearing, that counsel for the plaintiffs be awarded attorney's fees against the Commonwealth of Kentucky, without any finding of facts that indicated any change since November 26, 1980 in the nature of the liti-

gation or that any prospective relief was sought or granted in this action.

I. THE PLAINTIFFS SOUGHT RETROSPECTIVE RELIEF, SIMILAR TO TORT DAMAGES, AND ARE PROHIBITED FROM RECEIVING ATTORNEY'S FEES UNDER *HUTTO*.

The Agreed Order of Dismissal which settled this case did not seek injunctive relief or any form of prospective relief on behalf of the plaintiffs against the Commonwealth. The plaintiffs only sought monetary damages. It is well settled that retrospective fees or claims against a state are barred by the Eleventh Amendment to the United States Constitution. See *Quern* v. *Jordan,* 440 U. S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979); *Edelman* v. *Jordan,* 415 U. S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974); *Hutto* v. *Finney,* 437 U. S. 678, 57 L. Ed. 2d 522, 98 S. Ct. 2565 (1978).

The plaintiffs' case is primarily a tort action for assault and battery clothed in the language of 42 U.S.C. § 1983. As a tort action, the plaintiffs seek to vindicate only themselves and to protect the public's right to due process in the most indirect general manner.

> "Prevailing plaintiffs in civil rights actions are not routinely granted attorneys' fees simply because they are awarded damages. (Citations omitted). Rather, it is only when the plaintiffs advance the public's interest by bringing the action that an award of attorneys' fees is proper." *Zacone* v. *Perry,* 438 F. Supp. 788, 791, (E.D. N.Y. 1977).

Section 1988 was created to compensate attorneys who acted as "private attorneys general" to see that the broad constitutional rights were defended in the courts. The instant case does not safeguard any fundamental constitutional principles. Rather it is a narrow suit against select individuals akin to a common law tort action. Attorneys fees should not be awarded for these tort type actions which only seek restrospective damages. See *Martin* v. *Hancock,* 466 F. Supp. 454 (Minn. 1979); *Zacone* v. *Perry, supra.* No attorneys' fees should be awarded in this case because (1) they are retrospective fees which is clearly prohibited by the Eleventh Amendment and (2) the fees are not justified because they benefit only the individuals filing the suit. The Court should uphold its first order which it issued on November 26, 1980, and rule that the Commonwealth is not responsible for any attorneys' fees or costs whatsoever.

II. FACTUALLY, THIS CASE IS TOTALLY DIFFERENT FROM *HUTTO* AND THE PLAINTIFFS SHOULD NOT BE GRANTED ATTORNEY'S FEES UNDER THIS CRITERIA.

Hutto v. *Finney,* 437 U. S. 678, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978) first arose in 1969 over complaints that conditions in the Arkansas prison system violated the Eighth and Fourteenth Amendments to the United States Constitution. The United States Court for the Eastern District of Arkansas originally entered an order directing the Arkansas Department of Corrections to improve prison conditions. Subsequent hearings were held to determine if conditions were, in fact, improving. In 1973, the same District Court held that the continuing supervision by the court was no longer needed, but cautioned that sanctions as well as attorney's fees would be imposed if further violations occurred. The Eighth Circuit Court of Appeals reversed the lower court requiring that District Court hold additional hearings. The District Court held such hearings . . . and found that prison conditions had not been cured but had deteriorated and made express finding that the director of the Arkansas Department of Corrections had acted in bad faith. The plaintiffs in *Hutto* sought

injunctive relief requiring a change in the prison system. The State Attorney General defended the Director of the Department of Corrections throughout the entire litigation and the state of Arkansas actively participated in the litigation by payment of the attorneys and all necessary defense cost.

The facts in the present case are not similar to *Hutto, supra,* in any form. First, this case concerns allegations of police misconduct only. The plaintiffs presented no proof and agreed in the settlement of July 1, 1982 that *"no fault (was) found."* Emphasis added. *Hutto* was centered on the long standing nationally known brutality problems in the Arkansas correctional system. The instant case was a single isolated incident that has no historical basis and has not been repeated. The state of Arkansas supported and condoned the actions of its correctional officers by paying all legal fees, costs and monetary damages while the Commonwealth of Kentucky has refused to support the individuals who were sued in any form. The Attorney General of Kentucky did not defend the case. All damages, fees and costs were paid entirely by private funds. In short the Commonwealth has contributed nothing.

The federal court in *Hutto* also made a specific finding that the Arkansas Correctional Officers were acting in bad faith and that the state of Arkansas approved the officials' actions. Kentucky's method of handling the *Graham* case stands in stark contrast. A new Commissioner of State Police took over shortly after this incident and complete and thorough investigations were conducted internally first by the Kentucky State Police and second by the Justice Cabinet and externally by the Attorney General's Office. In short no factual similarities exist in *Hutto* and *Graham* and because the legal conclusion in *Hutto* is based on the facts, an award under the *Hutto* rationale is inappropriate in the case at bar.

III. NO AWARD OF ATTORNEYS' FEES OR COSTS MAY BE MADE AGAINST THE COMMONWEALTH OF KENTUCKY BECAUSE IT IS NOT A PART NOR IS AN ACTION PENDING AGAINST ANY EMPLOYEES OF THE COMMONWEALTH.

The Commonwealth of Kentucky was dismissed as a party by Order of this Court on November 26, 1980 and had not participated in this case since that date until it received the conflicting Order of September 9, 1982 holding it responsible for attorney's fees. Mr. Kenneth Brandenburgh, former Commissioner of the Kentucky State Police, was dismissed with prejudice on July 1, 1982. The order dismissing Mr. Brandenburgh stated: "No fault having been found as to *any claim* against the defendant, Kenneth Brandenburgh, this action is dismissed settled, with prejudice . . . ." See Agreed Order Dismissing and Agreed Order Dismissing Settled. Because this Order dismissed any claim against Mr. Brandenburgh, it dismissed the claims against him in his official capacity as well as in his individual capacity. Paragraph one of this same Agreed Order also dismissed the State Police officers who remained in the lawsuit. The claims against these officers were also dismissed with prejudice. Simply put, there is no pending action and no party before this Court. Each and every defendant has been dismissed from this action. The case is final and the plaintiffs have shown no reason to reopen this case to attempt to obtain attorney's fees.

This case is totally different from the *Hutto* case. In *Hutto* the individual correctional official was before the Court. No claims had been dismissed against the correctional officials and the Court reasoned that it could, in that instance, because of the long documented history of state officials acting in bad faith and because of the District Court's repeated warnings that attorney's fees would

be assessed if the officials did not follow court's orders, the Supreme Court ruled that the state of Arkansas was in effect before the court through its agent, the correctional officer. The Commonwealth of Kentucky has no agents in this case. All of its employees, which the Commonwealth submits were acting individually and not in their official capacity, have been dismissed with prejudice as to all claims. Furthermore, even if these individuals were still present in the lawsuit, the Commonwealth is prejudiced because it has not participated in the settlement nor any other portion of the lawsuit since November, 1980. Thus because all defendants have been dismissed the Court should not levy fees or costs against the Commonwealth.

IV. THE PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THEY ARE A PREVAILING PARTY UNDER 42 U.S.C. § 1988.

The plaintiffs are not a prevailing party within the meaning of 42 U.S.C. §1988. This case was settled by all parties who had not been previously dismissed outright by the Court. The language of the Agreed Order of Settlement, which is below clearly states that no decision was made on the issues and that fault was not found to exist.

By agreement of the parties, it is so ordered:

1. No fault having been found, this action is dismissed with prejudice against Defendants, Antle, Dalton, Tilford, Stiles, Creekmore, Ross, Anderson, Edwards, Slack, Robert Wilson, Norris, Ronald Wilson, Jones, Stewart, Williams, Kipper, Hammond, Wyatt, Robey, McReynolds, Foster, McQuown and Bennett.
2. No fault having been found as to any claim against the Defendant, Kenneth Brandenburgh, this action is dismissed settled, with prejudice, at the defendant's cost.

The Commonwealth agrees that a successful plaintiff who has prevailed on important issues may recover attorney's fees for a settlement under limited circumstances. However the plaintiffs, have not shown why they should recover a fee from the Commonwealth in this case. The plaintiffs have not prevailed against the Commonwealth because the Commonwealth is not and was not a party. Furthermore, they did not prevail against any of the individual defendants, either in their individual or official capacities, because the language of the Order states that no fault was found. The plaintiffs and the defendants, who were not dismissed outright from the lawsuit including the Commonwealth, entered into an *in camera* settlement to which the Commonwealth was not and is not a privy and has not seen. These parties cannot bind the Commonwealth to a settlement *in absentia* and this Court should not permit it. If this Court permits the payment of attorney's fees in this case, they are setting the unfortunate precedent that a governmental body, which is dismissed outright from the case, has not participated in the case for approximately two years, and has acted in good faith at all times, may be held liable for attorney's fees. A ruling such as this, in effect, requires a governmental body to pay for attorney's fees in any case where a governmental employee is involved, either individually or officially, even if it is stipulated that no fault was found.

While the Commonwealth has not been privy to the *in camera* settlement agreement, various monetary figures were stated by attorney for the plaintiffs, Mr. Lowery, during the October 15, 1982 hearing. These figures are substantially less than the requested attorney's fees. The attorney's fees bear no relationship to the small sum for which the plaintiffs settled. The plaintiffs have failed to show that they are a prevailing party against the Com-

monwealth and this Court should vacate its Order granting attorney's fees and costs.

CONCLUSION

The Commonwealth asks that the Order of September 9, 1982 granting attorney's fees be vacated.

Respectfully submitted,

(s) Paul F. Isaacs
Paul F. Isaacs
Office of General Cousel
Justice Cabinet
State Office Building
Frankfort, Kentucky 40601

(s) Cathy Cravens Snell
Cathy Cravens Snell
Office of General Counsel
Justice Cabinet
State Office Building
Frankfort, Kentucky 40601
Counsel for Defendant
Commonwealth of Kentucky